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No. 87-52

In the Supreme Court of the United States

OCTOBER TERM, 1987

PAUL E. MERRELL, PETITIONER

v.

LEE THOMAS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the procedural requirements of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, are applicable to decisions by the Environmental Protection Agency granting registration applications under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. (& Supp. III) 136 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 807 F.2d 776. The opinion of the district court (Pet. App. C) is reported at 608 F. Supp. 644.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1986. The petition for rehearing

was denied on April 6, 1987 (Pet. App. B). The petition for a writ of certiorari was filed on July 3, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. (& Supp. III) 136 *et seq.*, regulates the marketing and use of pesticides. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). Since the enactment of FIFRA in 1947, Congress has required that any pesticide product distributed in interstate commerce be registered with the federal government. Ch. 125, § 3(a)(1), 61 Stat. 166. See *Monsanto*, 467 U.S. at 990-991.[1] As originally enacted the statute regulated only the labeling and marketing of pesticides. In 1972, Congress revised the statute extensively to deal with heightened concerns about the environmental effects of pesticide use and with problems that had arisen in the registration system (Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973). While recognizing a need for significantly increased environmental protection and a desire for more public disclosure of information on the effects of pesticides, Congress also concluded that pesticides produce substantial benefits and that the needs of pesticide producers to protect trade secrets and confidential business information should be accommodated. See S. Rep. 92-838, 92 Cong., 2d Sess. 1-5 (1972). In the 1972 amendments,

[1] The Department of Agriculture administered the pesticide registration program until 1970, when the newly-created Environmental Protection Agency succeeded to these responsibilities. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623; *Monsanto*, 467 U.S. at 991.

Congress set about the task of accommodating these disparate interests.

When the 1972 amendments became effective FIFRA directly regulated, for the first time, pesticide use as well as pesticide labeling and marketing (*Monsanto*, 467 U.S. at 991-992). In addition, the amendments supplied a new substantive criterion for registration: that the pesticide would not cause "unreasonable adverse effects on the environment" (§ 3(c)(5)(C)-(D), 86 Stat. 980-981), which Congress defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide" (§ 2(bb), 86 Stat. 979). The legislation also required the Environmental Protection Agency (EPA) to apply the new standard to all previously registered pesticides and to review and reregister these products. (§ 4(c)(2), 86 Stat. 999). The new standard was also incorporated into the administrative procedures for cancellation and suspension of pesticides (§ 6(b) and (c), 86 Stat. 984-985).

Another feature of the 1972 amendments was the establishment of a mandatory licensing scheme for the health and safety data applicants were required to submit in order to obtain a registration. This system permitted EPA to consider data submitted by one company to approve applications for similar products from other persons (§ 3(c)(1)(D), 86 Stat. 979-980). See *Monsanto*, 467 U.S. at 992. Congress also addressed the question of public disclosure of data submitted to EPA by requiring the agency to publish a notice in the Federal Register of each application for registration if the pesticide contained "any new active ingredient or it would entail a changed use pattern," to allow 30 days for public

comment (§ 3(c)(4), 86 Stat. 979-980). EPA was further directed to make the data required for registration available to the public within 30 days of registration (§ 3(c)(2), 86 Stat. 980). This requirement, however, was specifically qualified by the provisions of Section 10, 86 Stat. 989, which protected the property interests of applicants by permitting them to designate portions of their submissions to EPA as trade secrets or confidential business information, and which prohibited EPA from disclosing that information if the agency concluded the data "contain[ed] or relat[ed]" to trade secrets or confidential business information.[2]

These provisions, particularly the definition of trade secrets, were the subject of much litigation that led to decisions which effectively prevented the disclosure of health and safety data and barred consideration by EPA of such data to register other pesticide products. See *Monsanto*, 467 U.S. at 993. To correct this and other problems, Congress again amended the FIFRA in the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819. The 1978 amendments continued the prohibition on disclosure of trade secrets and confidential business information, but with a specific qualification to authorize disclosure of health and safety data *after* registration

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[2] The sole exception to this ban on disclosure permitted EPA, "when necessary to carry out the provisions of this Act," to reveal information relating to formulas to other Federal agencies or "at a public hearing or in findings of fact issued by the Administrator [of EPA]" (§ 10(b), 86 Stat. 989). The Administrator was required to notify the applicant who submitted the data 30 days before any proposed release of information in order to provide the applicant an opportunity to seek judicial review (§ 10(c), 86 Stat. 989).

(7 U.S.C. (& Supp. III) 136h(d)).[3] Congress also enacted protections to guard against disclosure to foreign and multinational pesticide producers either before or after registration: Section 10(g) prohibits EPA from knowingly disclosing any submitted information to such entities or to persons intending to deliver the information to such entities (7 U.S.C. 136h(g)).

The 1978 amendments also added a provision (§ 3(c)(8)) intended to govern EPA's *public* administrative review of the risks and benefits of any pesticide, a review EPA undertakes before deciding whether to conduct formal proceedings to cancel, suspend, or deny a registration (7 U.S.C. 136a(c)(8)). EPA may not conduct such a *public* review unless it "is based on a validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or the environment" (*ibid.*).[4]

2. Petitioner brought this action seeking to cancel the registration of seven herbicides licensed un-

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[3] This authorization does not permit disclosure of any information regarding manufacturing or quality control processes, or information disclosing the identity of, percentage quantity of, or testing methodology for deliberately added inert ingredients, except when necessary to protect against an unreasonable risk to health or the environment. 7 U.S.C. 136h(d)(1)(A), (B) and (C).

[4] Congress also expected EPA to provide registrants an opportunity, through private written communication, to address and resolve the agency's concern about the risk posed by any pesticide prior to initiating public review. S. Conf. Rep. 95-1188, 95th Cong., 2d Sess. 35-36 (1978). The purpose was to "furnish a greater degree of protection for the property rights of pesticide registrants and ameliorate the indictment-like characteristics of the [interim review] process" (*id.* at 36).

der FIFRA that a local road department planned to spread along a road near his wife's farm (Pet. App. 2a). Petitioner first placed a telephone call to EPA asking that the planned spreading be halted, and less than one week later he filed this lawsuit (see E.R. 1; S.E.R. 1-2).[5] The complaint sought relief *not* on the ground that the continued use of these pesticides failed to meet the criterion of FIFRA that registered pesticides not cause "unreasonable adverse effects on the environment," but on the ground that EPA's extensive procedures for the review of the environmental effects of pesticides did not comply with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.* (E.R. 7-9).

Several chemical companies holding registrations for the particular pesticides at issue, and their trade association, intervened as defendants. The district court granted summary judgment for the defendants and dismissed the complaint, holding that the environmental review conducted by EPA before issuing registrations under FIFRA satisfied the objectives of NEPA, and therefore that EPA had no independent obligation to comply with the NEPA procedures (Pet. App. 25a-29a).

3. The court of appeals unanimously affirmed. Its opinion canvassed the various amendments to FIFRA in 1972, 1975, 1978, and 1984, which comprehensively revised the statute and which were all enacted after the passage of NEPA. The court concluded that in these complex, highly detailed amendments, Congress had designed, and then redesigned, a pesticide regis-

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[5] "E.R." refers to the Excerpt of Record petitioner filed in the court of appeals; "S.E.R." refers to the Supplemental Excerpt of Record the government filed in the court of appeals.

tration scheme that attempted to reconcile the interests of the public in expanded environmental protection and increased information about pesticides, with the interests of the manufacturers of pesticides in protecting trade secrets and confidential business information (Pet. App. 8a-26a). In the court's view, the fragile balance Congress achieved only after repeated consideration of the appropriate way for EPA to evaluate and protect against the environmental risks of pesticide use, allowed no room for the largely redundant procedures of NEPA, a statute which also requires federal agencies to take a " 'hard look' " at the environmental consequences of their actions. See *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The court further observed that the broad public disclosure provisions of NEPA stood in stark contrast to the regime Congress enacted in FIFRA, and concluded that there was no indication that Congress intended the NEPA procedures to upset FIFRA's delicate balance (Pet. App. 9a-10a, 15a-16a, 21a-22a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

1. Petitioner's principal contention is that the court of appeals has resolved the question of the potential conflict between NEPA and FIFRA inconsistently with this Court's decision in *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976). The Court held in *Flint Ridge* that where a federal agency's duty under another statute gives rise to an "irreconcilable and fundamental conflict" or a "clear and unavoidable conflict" with obliga-

tions NEPA might impose, the agency is excused from complying with NEPA (426 U.S. at 788). In order to suggest that the court of appeals applied a different standard, petitioner places almost exclusive reliance on the court's use of the word "incompatible" (Pet. App. 11a) in place of this Court's synonymous formulation.[6] Petitioner is mistaken.

The judgment in this case stems not from the court of appeals' application of a less stringent rule than required by *Flint Ridge*, but from the court's analysis of the significant limitations prescribed by Congress on the public disclosure of information during the registration process and on public participation in that process. FIFRA requires EPA to conduct a thorough review of the environmental consequences

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[6] In fact, the court of appeals' use of the term "incompatible" (Pet. App. 11a) occurs only in its discussion of one element of the FIFRA's statutory scheme—the provision of the statute, added in 1972, in which Congress directed EPA to act on registration applications "as expeditiously as possible." See 7 U.S.C. 136a(c)(3). The court below reviewed and relied on significantly more of the history of FIFRA, including the extensive amendments in 1975 and 1978 and their legislative history, which showed a clear congressional intent to design a registration process that balanced the competing interests of the public and the pesticide manufacturers (Pet. App. 8a-18a). The court's conclusion that application of NEPA is incompatible with Congress's direction to expedite the registration process is plainly correct. EPA processes up to 16,000 applications every year (S.E.R. 28), and while not all of them would require a complete environmental impact statement, the NEPA procedures that petitioner seeks to impose would severely impair EPA's ability to administer the pesticide registration program. As the court of appeals recognized (Pet. App. 13a-16a), it was precisely Congress's purpose, in amending and revising this statute on several occasions, to break the gridlock that had paralyzed the registration system.

of registration, but petitioner consistently ignores that Congress, in its various revisions of the registration process, also restricts EPA's ability to conduct that environmental review on a public basis. The court of appeals determined, after a comprehensive review of the statutory scheme, that application of the NEPA procedures "would sabotage the delicate machinery that Congress designed to register new pesticides" (Pet. App. 15a-16a). That conclusion is unassailable.

Petitioner maintains (Pet. 15) that application of NEPA would "require EPA to disclose more fully the impacts of such registration," yet petitioner concedes (Pet. 8) that "[i]f FIFRA prohibited the type of public participation that NEPA requires there would be a conflict." Petitioner errs in asserting (Pet. 8) that there is no such conflict.

FIFRA itself places significant limitations on EPA's ability to provide for public participation in the registration decision and to disclose information prior to the grant of a registration. Contrary to petitioner's argument (Pet. 10 n.10), Section 10(d) of FIFRA does not require disclosure of information about environmental impacts *prior to registration*; that Section applies only to "a *registered or previously registered* pesticide * * *" (7 U.S.C. (& Supp. III) 136h(d) (emphasis supplied)). Other provisions of the statute prevent any significant disclosure or opportunity for public participation in the initial registration decision (*e.g.*, 7 U.S.C. 136a(c)(8) (imposition of evidentiary threshold prior to public review of registration or registration application)); 7 U.S.C. 136h(b) (EPA must honor legitimate claims of trade secrets and confidential business information); 7 U.S.C. 136h(g) (bar on the disclosure of *any*

information submitted by applicants to foreign and multinational pesticide producers, whether directly or indirectly by general publication)).

FIFRA's legislative history confirms that Congress did not intend to permit disclosure of data prior to registration. In 1972, the Senate bill amending FIFRA would have permitted the release of toxicological data prior to registration. 118 Cong. Rec. 32258. See S. Rep. 92-970, 92d Cong., 2d Sess. 3, 20 (1972); S. Rep. 92-838, 92d Cong., 2d Sess. Pt. 2, at 70 (1972). In conference, however, the Senate receded, and the "liberal[ized]" disclosure provisions were eliminated from the bill. H.R. Conf. Rep. 92-1540, 92d Cong., 2d Sess. 34 (1972). A deletion of a provision in conference "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulfport Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974).

The statutory limitations on public disclosure and participation, amplified by the legislative history, demonstrate that a clear conflict exists between the requirements of FIFRA and those of NEPA. The court of appeals expressly found such an inconsistency (Pet. App. 9a, 12a, 15a, 24a, 29a), concluding that the amendments to FIFRA in 1972, 1975, and 1978, represent Congress's repeated attempts to fine-tune the "careful balance between 'the legitimate right of the public to know the basis for agency decisions and the right of a business to see that the manufacturing process and other trade secret information controlled by the Act are not disclosed for the commercial advantage of competing business interests'" (*id.* at 15a, quoting H.R. Rep. 95-663, 95th Cong., 1st Sess. 18-19 (1977)). Simply put, EPA cannot, consistent with its obligations under

FIFRA, grant the kind of public participation in the consideration of applications for registration that petitioner demands. In analogous circumstances, this Court has held that NEPA cannot be construed to require an agency to abandon its particular statutory obligations. *Flint Ridge*, 426 U.S. at 788. See *Weinberger* v. *Catholic Action/Peace Education Project*, 454 U.S. 139, 145-146 (1981); *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973) ("NEPA was not intended to repeal by implication any other statute").[7]

2. Petitioner's remaining points are simply variations on the same theme. Contrary to petitioner's argument (Pet. 10-15), the court did not refuse to adhere to this Court's precedents disfavoring implied repeals and exhorting courts to harmonize, if possible, apparently conflicting statutes. See *Watt* v.

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[7] Petitioner places great reliance (Pet. 5-6, 9-10) on the court of appeals' observation (Pet. App. 31a n.1) that the application of the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. III) 552, which govern public disclosure under NEPA, might result in limitations on public disclosure that are identical or similar to those that result directly from FIFRA. *See Weinberger* v. *Catholic Action*, 454 U.S. at 145. On this observation petitioner premises his repeated assertion that the court found that EPA can comply with all the procedural requirements of both FIFRA and NEPA. Petitioner is incorrect. The court of appeals merely stated that it was unnecessary to determine the limits FOIA might place on disclosure. Whether the limitations on public disclosure and public participation in the registration process result from the application of FOIA or FIFRA, or some combination of the two, the fact remains that Congress in FIFRA deliberately precluded the kind of public disclosure and participation that petitioner seeks. That conclusion is dispositive of petitioner's claim.

Alaska, 451 U.S. 259, 267 (1981); *TVA* v. *Hill*, 437 U.S. 153, 189 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974). The basic interpretative standard used in these cases, irreconcilability, is the same one this Court has prescribed as the test for determining whether an agency's duties under one statute excuse it from complying with the procedures required under NEPA, which was the precise issue presented to the court below. See *Flint Ridge*, 426 U.S. at 788. In either situation, the question can be resolved only by a careful analysis of the two statutes and their requirements. As we have shown, the court below performed that analysis and concluded that the duties and responsibilities Congress assigned to EPA under FIFRA excused the agency from any duty to comply with NEPA when reviewing applications for pesticide registrations. Having reached that conclusion, the court had no need to do anything else since *Flint Ridge* and its progeny were the appropriate cases to apply. See also *Brown* v. *General Services Administration*, 425 U.S. 820, 834-835 (1976), and cases there cited. In any event, the result would not be different under the authorities upon which petitioner relies, since in practical terms the inquiry would be the same.

3. Finally, there is no basis for petitioner's concern (Pet. 4-5) that a major federal program has escaped the environmental review required by NEPA. On the contrary, as the court of appeals perceived (Pet. App. 9a, 21a-22a), FIFRA itself requires EPA to examine the environmental effects of pesticide registration. Thus, review under FIFRA satisfies the primary objective of NEPA: that agencies consider the environmental consequences of their decisions. See *Weinberger* v. *Catholic Action*, 454 U.S. at 143.

Indeed, it is on this very basis that many courts have exempted EPA, whose mission is to protect the environment, from the requirement to prepare an environmental impact statement when making decisions under the various statutes EPA administers, including FIFRA. *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1051 (D.C. Cir. 1978) (Clean Water Act); *Wyoming* v. *Hathaway*, 525 F.2d 66, 71-72 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976) (FIFRA); *Amoco Oil Co.* v. *EPA*, 501 F.2d 722, 749-750 (D.C. Cir. 1974) (Clean Air Act); *EDF, Inc.* v. *EPA*, 489 F.2d 1247, 1256-1257 (D.C. Cir. 1973) (FIFRA); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 379-387 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (Clean Air Act); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301, 1306 (10th Cir. 1973) (Clean Air Act); *Warren County* v. *State of North Carolina*, 528 F. Supp. 276, 286-287 (E.D.N.C. 1981) (Toxic Substances Control Act); *EDF, Inc.* v. *Blum*, 458 F. Supp. 650, 661-662 (D.D.C. 1978) (FIFRA); *Maryland* v. *Train*, 415 F. Supp. 116, 121 (D. Md. 1976) (Ocean Dumping Act).[8] Similarly, there is no need to require EPA to comply with NEPA in order to assure that the agency takes the required "hard look" at the environmental impacts of pesticide registration. See *Kleppe* v. *Sierra Club*, 427 U.S. at 410.[9]

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[8] Although the court of appeals did not base its decision on the functional equivalency doctrine applied in these cases, the court did not reject that doctrine, contrary to petitioner's assertion (Pet. 6). As the court noted (Pet. App. 21a), the legislative history indicates that Congress recognized that requiring an EIS would be redundant in light of EPA's mission. See S. Rep. 94-452, 94th Cong., 1st Sess. 9 (1975).

[9] Nor will this decision encourage other agencies to claim unwarranted exemption from NEPA simply because they

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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have a statutory obligation other than NEPA to consider the environmental effects of their decisions. The result here turns on the analysis of a particular statute and its legislative history and offers no incentive to other agencies implementing different statutory schemes. See, *e.g.*, our currently pending brief in opposition in *Monongahela Power Co.* v. *Marsh*, No. 86-1642. (We are furnishing counsel for petitioner with a copy of that brief).

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